

PENCADER ASSOCIATES, LLC.)
)
 Plaintiff,)
) Civil Action No. 08C-02-162 WCC
 v.)
)
 SYNERGY DIRECT MORTGAGE INC.)
)
 Defendant.)

CARPENTER, J.

Introduction

This is the Court's decision addressing the breach of contract and quantum meruit claims brought forth by Plaintiffs Pencader Associates, LLC ("Pencader") against Defendants Synergy Direct Mortgage, Inc. ("Synergy"). A bench trial was held before this Court on March 8 and 9, 2010 addressing: (1) whether a contract or contracts existed between the parties; (2) whether the contract(s) were breached; (3) whether damages are appropriate; and (4) in the alternative if no contract found, whether damages are recoverable under quantum meruit.

Based upon the reasons below, the Court finds that Pencader and Synergy entered into contractual agreements for appraisal services performed by Pencader and that Synergy is partially responsible for payment of those services.

Facts

Plaintiffs Pencader Associates, LLC is a real estate appraisal company that offers services in valuing real property. Defendants Synergy Direct Mortgage, Inc. is a mortgage broker who receives inquiries from potential borrowers seeking to obtain a mortgage to purchase a new home or to refinance an existing mortgage. Synergy as a mortgage broker would only receive compensation when an ultimate lender is secured to provide a loan to the prospective borrower.

The relationship between Pencader and Synergy commenced sometime in 2006 when Pencader agreed to provide real estate appraisal services valuing real property at the request of Synergy. Incredibly no formal written contract setting forth the terms of the relationship between Pencader and Synergy was ever executed. Instead it appears that Synergy would engage Pencader to perform an appraisal simply by forwarding a request form as to a particular property and this would cause Pencader to perform the appraisal. While the cost for each appraisal was approximately \$300, no formal agreement existed as to payment or billing procedures or the expectations of each party regarding payment if the mortgage was unapproved or failed to proceed to settlement. In spite of the lack of any formal agreement as to this relationship, Pencader continued providing appraisal services to Synergy through 2007 and this business occupied the majority of the appraisal business time of one of their employees.

In February 2008, Pencader conducted an internal audit and concluded that Pencader was not compensated for a large number of appraisals performed for the benefit of Synergy. A bill was then sent to Synergy demanding payment for outstanding appraisals conducted up to two years earlier. The parties were unable to resolve the billings relating to 310 appraisals conducted in 2006 and 2007 and

Pencader filed its complaint on February 15, 2008 based on two theories: breach of contract and, in the alternative, quantum meruit.

Parties' Contentions

Pencader contends the existence of (a) contractual agreement(s) with Synergy to perform appraisals and that Synergy breached the agreement(s) when failing to pay Pencader for the services provided. Therefore, Pencader should be compensated for all appraisals performed and is entitled to damages.

Synergy acknowledges that Pencader did perform appraisals at their request. However, they argue they were never responsible for compensating Pencader directly. Instead they argue that Pencader would be compensated in one of two ways: (1) if the appraisal form was marked "COD" (Collect at Door) Pencader was to obtain payment from the homeowner or buyer for whom the appraisal was being performed; or (2) if the appraisal form was marked "Bill to Synergy" they would be paid by the closing attorney if the real property appraised proceeded to closing. If no loan was secured and/or the real property appraised did not close, Synergy argues that customary business practice would be that neither they nor Pencader would be compensated for the services provided.

Standard

In a bench trial, the Court is the finder of fact and the parties must prove the elements of each of their claims by a preponderance of the evidence.¹ This means that the Court shall find in favor of the party upon whose side “the greater weight of the evidence is found.”²

Discussion

An actionable breach of contract claim requires the Plaintiff to successfully prove: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from the breach.³ Under Delaware law, a contract exists if there is “an offer made by one person to another and an acceptance of that offer by the person to whom it is made.”⁴ An offer is “the signification by one person to another of his willingness to enter into a contract with him on the terms specified in the offer.”⁵ The Court does not consider the subjective intention of the parties when determining whether a contract was formed.⁶ Instead the Court applies an objective test evaluating the parties’ “objective manifestations of assent.”⁷

¹ *Pouls v. Windmill Estates, LLC*, 2010 WL 2348648, at *4 (Del. Super. June 10, 2010) (citing *Patel v. Patel*, 2009 WL 427977, at *3 (Del. Super. Feb. 20, 2009)).

² *Id.*

³ *Pouls*, 2010 WL 2348648, at *4 (citing *Bramble Const. Co., Inc. v. Exit Realty, LLC*, 2009 WL 3069686 (Del. Super. Aug. 27, 2009)).

⁴ *Bramble Const. Co., Inc.*, 2009 WL 3069686, at *2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Based on the evidence presented at trial, the Court finds that a contractual relationship existed between Pencader and Synergy. The parties entered into separate contracts each time Synergy requested appraisal services from Pencader and Pencader performed those services. The appraisal forms set forth the terms of each contract entered into and Pencader accepted the contract and its terms by performance of the appraisal request. Because each appraisal request form set forth different terms, the Court finds that each appraisal form entered into was a separate contract between Pencader and Synergy.

However, what complicates the issue here are the compensation terms indicated on the appraisal forms. As stated above, the appraisal forms set forth the terms of the agreements between the parties and indicated how Pencader would be compensated for its appraisal services. Of the 310 appraisal forms in dispute, each form falls into one of four general categories with regard to compensation: (1) appraisal forms that cannot be reproduced for the record; (2) appraisal forms marked “COD;” (3) appraisal forms marked “Bill to Synergy” and (4) appraisal forms that are marked neither “COD” nor “Bill to Synergy.” The Court will address each category of billing individually.

A. Appraisal Forms That Cannot be Reproduced For the Record

Twenty-nine appraisal forms cannot be reproduced for the record; however Pencader submits that these appraisals were performed for the benefit of Synergy so Synergy should be liable for such performances. Because these appraisal forms cannot be reproduced for the Court's review, the Court finds that these twenty-nine appraisals are not recoverable by Pencader. As noted above, the appraisal forms set forth the terms of the agreement which includes the compensation terms. Thus, without copies of the appraisal forms in question, the Court would be forced to speculate as to what was indicated on each of those forms. The Court is not in a position to do so. Therefore, because what is indicated on the appraisal request form is essential to the Court's decision, the Court finds that Pencader cannot recover for these twenty-nine appraisals.

B. Appraisal Forms Marked Neither "COD" Nor "Bill to Synergy"

Pencader submits twenty-one appraisal request forms that were marked neither "COD" nor "Bill to Synergy." Similar to the twenty-nine appraisal forms which cannot be reproduced for the record, without a specific marking of "COD" or "Bill to Synergy" the Court would be forced to speculate as to what the compensation agreement was between the parties. Due to the large volume of appraisals performed, witnesses could not credibly recall specific conversations about individual appraisals

and how these requests would be handled. Therefore, the Court finds that the twenty-one appraisal forms with no specific markings as to compensation are not recoverable.

C. Appraisal Forms Marked “COD”

One hundred forty-two appraisal forms were marked “COD.” At trial Pencader submits that even though the appraisal form may have been marked “COD,” Pencader’s employee, Nina Lazama would receive approval from Synergy to perform the appraisal and bill the appraisal to Synergy.⁸

Because the Court is the fact finder in a bench trial, it is the Court’s role to resolve the conflicts in witnesses’ testimony and weigh their credibility.⁹ After hearing Ms. Lazama’s testimony at trial, the Court finds Ms. Lazama’s testimony not credible on this issue and as a result finds that Synergy is not responsible for those appraisals marked “COD.” Other than Ms. Lazama’s testimony, Pencader provided no additional support that Synergy undertook the responsibility for these payments which were suppose to be collected from the mortgage applicant at the time the appraisal was performed. There is no indication who at Synergy approved the modification to the form (contract) and it is equally possible that money was actually collected from the buyer or homeowner and the inadequate business records of

⁸ Trial Tr. 131, Mar. 8, 2010.

⁹ *Johnson v. State*, 929 A.2d 784 (Del. 2007) (TABLE).

Pencader simply failed to record the transaction. These sloppy business practices by Pencader make it impossible for the Court to determine the contract terms, and the Plaintiff has no one but themselves to blame for this situation. Therefore, the Court finds that the one hundred forty-two appraisals marked “COD” are not recoverable by Pencader as the Plaintiff has failed to establish by a preponderance of the evidence that the terms of the contracts were modified by subsequent conversations with Synergy.

D. Appraisal Forms Marked “Bill to Synergy”

The remaining one hundred eighteen appraisal forms were marked “Bill to Synergy.” Because the appraisal forms set forth the terms of the agreement, the Court finds that Synergy is responsible for the appraisals conducted by these requests.

Synergy argues that they are not responsible for those appraisal forms marked “Bill to Synergy” because a “Bill to Synergy” marking indicates that Pencader would only be compensated for its appraisal services if Synergy was able to secure a lender and/or the sale of the real property went through to closing. Since Synergy is only compensated for its services if a lender is secured, they argue that compensation for Pencader’s services would follow similar suit. The Court simply finds this argument to be without merit. When Synergy faxed an appraisal form to Pencader, it was contracting for Pencader’s services and therefore is liable for compensation of such

services. Whether a loan would be secured or whether the sale of the real property closed are not contingency factors that affected Synergy's contractual responsibility to compensate Pencader.

Furthermore, a review of the appraisal forms which in essence are the contracts between the parties does not show any terms set forth by Synergy setting forth the contingency nature of these transactions. The appraisal forms here only indicate that Synergy would be billed and nothing further. Thus Synergy is liable for the one hundred eighteen appraisal forms in question marked "Bill to Synergy."

However, another layer of difficulty is added to the equation. Of the one hundred eighteen appraisal forms marked "Bill to Synergy" some of these appraisals proceeded to closing and were listed on the U.S. Department of Housing & Urban Development Settlement Statement ("HUD") for that closing. Therefore, where Pencader's appraisal services were listed on the HUD closing statement, it is rational for the Court to conclude that Pencader received or should have received compensation from the attorney at the time of closing. If they have not, their complaint should be with the attorney who conducted the closing and not Synergy.¹⁰

As such, Synergy is only liable for the "Bill to Synergy" appraisal forms in question

¹⁰ The Court notes that it appears from the testimony that most of the closings relating to the disputed invoices were performed by only a select group of attorneys who should be easily identifiable.

minus those appraisals for which the Court could correlate with a HUD form that listed Pencader to be paid at the time of closing.

E. Damages

Now that the Court has concluded that Pencader is entitled to payment for all appraisal forms marked “Bill to Synergy” except those in which the Court could confirm that Pencader was listed on the HUD closing statement, it must then be determined the amount of damages owed to Pencader for Synergy’s breach.

A review of the bills sent from Pencader to Synergy¹¹ reveal that the appraisals in question have a general value of \$300.00 each appraisal. The Court uses this \$300.00 value and multiplies it to the one hundred eighteen “Bill to Synergy” appraisals receiving a total of \$35,400.00. Of the HUD forms provided which could be connected to a request form, seven listed Pencader as a payee in the closing docket appraisal fees.¹² Therefore, multiplying seven by \$300.00 for each appraisal totals \$2,100.00. After subtracting \$2,100.00 from \$35,400.00, the Court awards damages to Pencader in the amount of \$33,300.00.

¹¹ Pl.’s Ex. 2-5.

¹²Of the HUD forms submitted for the Court’s review, the Court acknowledges that twenty-two of these HUD forms listed Pencader to be paid at the time of closing. However of these twenty-two forms, only seven are associated with the “Bill to Synergy” appraisal forms in dispute. These seven properties include: 137 Sheehan Drive, Middletown, Delaware 19709; 1510 Blairs Pond Road, Milford, Delaware 19963; 218 Adams Rdb, Port Deposit, Maryland 21904; 107 Chesterfield Drive, New Castle, Delaware 19720; 1954 Old Kirkwood Road, Bear, Delaware 19701; 109 Worthy Down Avenue, Bear, Delaware 19701; 330 Corbitt Circle, Bear, Delaware 19701. It is reasonable to conclude that the remaining 15 forms were associated with appraisal forms that were either not produced for the record or marked neither “COD” nor “Bill to Synergy.”

As to Pencader's alternative claim involving quantum meruit the Court will dismiss this claim as moot because damages have been awarded for Pencader's breach of contract claim.

Conclusion

In conclusion, the Court makes the following findings:

- (1) Contracts for appraisal services existed between Pencader and Synergy.
- (2) Synergy did not breach those contracts which could not be reproduced for the record, those contracts that did not specifically mark "COD" or "Bill to Synergy," and those contracts that were marked "COD."
- (3) Synergy did breach the contracts that were marked "Bill to Synergy" excluding those contracts that proceeded to closing and where Pencader was listed on the HUD closing statement.
- (4) Damages are due to Pencader in the amount of \$33,300.00 for the appraisal services performed by Pencader.
- (5) Pencader's quantum meruit claim is dismissed.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.